No. ~~631~~ 25

In the Supreme Court of the United States

OCTOBER TERM, 1959

GUS POLITES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The court of appeals rendered no opinion. The opinion of the district court (R. 55–59; Pet. App. B 30–34)[1] is not yet reported. The earlier opinion of the district court revoking petitioner's citizenship (R. 22–35) is reported at 127 F. Supp. 768.

JURISDICTION

The judgment of the court of appeals was entered on October 16, 1959 (R. 62). The petition for a writ of certiorari was filed on January 5, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] "R." designates the appendix to petitioner's brief in the court of appeals, now on file with the Clerk of this Court.

QUESTIONS PRESENTED

1. Whether, after petitioner stipulated to dismissal of his appeal from a judgment of denaturalization following the denial of petitions for writs of certiorari in related cases, he may collaterally attack that judgment under Rule 60(b) of the Federal Rules of Civil Procedure on the ground that subsequent decisions of this Court have established that his denaturalization was invalid.

2. Whether petitioner's denaturalization was valid.

STATUTE AND RULE INVOLVED

Section 305 of the Nationality Act of October 14, 1940, 54 Stat. 1141, provided in pertinent part:

> No person shall hereafter be naturalized as a citizen of the United States—
>
> * * * * *
>
> (b) Who believes in, advises, advocates, or teaches, or who is a member of or affiliated with any organization, association, society, or group that believes in, advises, advocates, or teaches—
>
> (1) the overthrow by force or violence of the Government of the United States or of all forms of law; * * *
>
> * * * * *
>
> (d) Who is a member of or affiliated with any organization, association, society, or group that writes, circulates, distributes, prints, publishes or displays, or causes to be written, circulated, distributed, printed, published, or displayed, or that has in its possession for the purpose of circulation, distribution, publication, issue, or display, any written or

printed matter of the character described in subdivision (c).

* * * * * *

The provisions of this section shall be applicable to any applicant for naturalization who at any time within a period of ten years immediately preceding the filing of the petition for naturalization is, or has been, found to be within any of the clauses enumerated in this section, notwithstanding that at the time petition is filed he may not be included in such classes.

Rule 60(b), Federal Rules of Civil Procedure, provides in pertinent part:

On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the

judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. * * *

STATEMENT

Petitioner, who was born in Greece and entered this country in 1916, was naturalized in the United States District Court for the Eastern District of Michigan on April 6, 1942 (R. 2–3, 8, 55). On June 16, 1952, the government instituted an action seeking cancellation of the certificate of naturalization under Section 338(a) of the Nationality Act of 1940, on the grounds of fraud and illegal procurement.

As to fraud, the complaint charged that, although petitioner had been a member of the Communist Party from 1933 to at least 1941, in the proceedings leading up to his naturalization he swore (1) that he had not within the past 5 years belonged to any clubs, organizations or societies, or organizations devoted in whole or in part to influencing or furthering the political activities of a foreign government [2] (2) that he believed in the form of government of the United States and (3) that he was attached to the principles of the Constitution of the United States. The charge of illegal procurement was that during the ten-year period preceding his application for naturalization petitioner was not a person of good moral character, was not attached to the principles of the Constitution,

[2] This answer was given by petitioner in December 1940 in registering as an alien pursuant to the Alien Registration Act of 1940.

and was knowingly a member of an organization which advocated overthrow of the Government of the United States by force or violence (R. 2–7). An affidavit of good cause detailing these charges was filed with the complaint (R. 8–12).

At the trial, evidence was introduced showing the illegal aims and objectives of the Communist Party (R. 50–52), and petitioner's active membership in the Party from 1931 to at least 1938 (R. 52–54).[3] On August 20, 1953, the district court entered a decree revoking the judgment admitting petitioner to citizenship, cancelling the certificate of naturalization, and restraining the petitioner from claiming any rights under the certificate (R. 36). The court held (R. 23–27, 28–31) that the government had shown that the Communist Party, of which petitioner admittedly had been a member within ten years prior to naturalization, advocated the overthrow of the United States Government by force and violence; that petitioner was "guilty of fraud in securing his American citizenship"; and that he had illegally procured citizenship because he "was not eligible to become a citizen" due to his Communist Party membership within the ten-year period.

Petitioner noted an appeal from the judgment of the district court, but did not proceed further. In

[3] Petitioner himself testified that he was a party member from 1931–1938, during which time he attended closed meetings; that he voluntarily withdrew from the Party in 1938 upon receipt of a directive from the General Secretary of the Party that all aliens cease membership in the Party; and that, despite his withdrawal, he still believed in the aims and objectives of the Party (R. 52–53).

1954 the appeal was dismissed with prejudice, by stipulation of counsel (R. 48, 55; Pet. 9).

On August 6, 1958, petitioner moved, pursuant to Rule 60(b)(5) and (6) of the Federal Rules of Civil Procedure (*supra*, pp. 3–4), to set aside the court's denaturalization judgment of August 20, 1953 (R. 37–49). He contended (R. 37–41) that, under the principles recently enunciated by this Court in *Nowak* v. *United States*, 356 U.S. 660 and *Maisenberg* v. *United States*, 356 U.S. 670, the judgment of denaturalization "is voidable" (R. 40).

The district court denied the motion (R. 59). It held that the *Nowak* and *Maisenberg* cases "do not * * * control the instant case" (R. 57); and that, in any event, petitioner could not collaterally attack the judgment in a Rule 60(b) proceeding on the ground that there had been "a change in the judicial view of the applicable law" (R. 58).

The court of appeals unanimously affirmed "for the reasons set forth" in the opinion of the district court (R. 62).

ARGUMENT

Approximately five years after entry of a final judgment of denaturalization against him, petitioner now seeks to vacate it by collateral attack under Rule 60(b). His substantive contention is that the legal theory upon which his denaturalization was based has been invalidated by the subsequent *Nowak* and *Maisenberg* decisions of this court. He seeks to justify his voluntary dismissal of the appeal from the denaturalization order, in which he could have litigated all the substantive questions he now at-

tempts to raise, on the ground that the appeal could not have prevailed in the light of the decisions of the court of appeals (to which he was appealing) in the *Sweet, Charnowola and Chomiak* cases (211 F. 2d 118), and the subsequent denial of certiorari in those cases (348 U.S. 817). Neither contention has merit.

1. Even assuming *arguendo* that this case is governed on the merits by *Nowak* and *Maisenberg, supra* (which we deny, see *infra*, pp. 9–12), there would nonetheless be no basis for collateral attack under Rule 60(b)(6).[4] For the record here shows the same "voluntary, deliberate, free, untrammeled choice of petitioner not to [proceed with his] appeal" that was held in *Ackermann* v. *United States*, 340 U.S. 193, 200, to preclude such collateral attack on the judgment.

The sole justification that petitioner offers for his failure to prosecute his appeal was that in view of the decision of the court of appeals in three other

[4] Petitioner's attempt also to invoke subdivision (5) of Rule 60(b), providing that a judgment shall be set aside if "it is no longer equitable that the judgment should have prospective application," is likewise unavailing. The prospective application of this judgment stems wholly from the consequences that flow from the part of the judgment that has already been completed, *i.e.*, the vacation of the judgment of naturalization and the cancellation of the certificate of naturalization. As this Court said in *United States* v. *Swift and Co.*, 286 U.S. 106, 119, in recognizing the principle which subdivision (5) embodies, "The injunction, whether right or wrong, is not subject to impeachment in its application to the conditions that existed at its making. We are not at liberty to reverse under the guise of readjusting". Petitioner is seeking a reversal of the judgment of the district court, not a readjustment. That is not within the scope of subdivision (5).

cases raising the same issue, and the denial of certiorari in those cases by this Court, it would have been futile for him to have further litigated his case. "But since [petitioner] chose not to pursue the remedy which [he] had, we do not think [he] should now be allowed to justify [his] failure by saying [he] deemed any appeal futile." *Sunal* v. *Large*, 332 U.S. 174, 181; cf. *United States* v. *Tucker Truck Lines*, 344 U.S. 33, 36–37. This is not a case where actions by the government in fact prevented an appeal from a denaturalization order, as in *Klapprott* v. *United States*, 335 U.S. 601, modified, 336 U.S. 942, or *United States* v. *Karahalios*, 205 F. 2d 331 (C.A. 2). Indeed, there is not here even the claims of poverty or reliance upon advice of a government official which the Court held in *Ackermann, supra*, to be an insufficient excuse for failure to appeal to justify collateral attack under Rule 60(b). This is simply a case where what once seemed to petitioner a losing cause now appears to him to have substantial merit if he can shatter the finality of the judgment.

Plainly, there are not here the "extraordinary circumstances" that can justify the use of collateral attack as a substitute for an appeal. As this Court stated in *Ackermann, supra*, p. 198:

> * * * Petitioner made a considered choice not to appeal; apparently because he did not feel that an appeal would prove to be worth what he thought was a required sacrifice of his home.

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[5] The denial of certiorari by this Court in *Sweet*, *Czarnowola* and *Chomiak* "imported no expression of opinion on the merits." *Sunal* v. *Large*, 332 U.S. 174, 181; *House* v. *Mayo*, 324 U.S. 42, 48.

> His choice was a risk, but calculated and deliberate and such as follows a free choice. Petitioner cannot be relieved of such a choice because hindsight seems to indicate to him that his decision not to appeal was probably wrong, * * *. There must be an end to litigation some day, and free, calculated, deliberate choices are not to be relieved from.

In accord, *see Title* v. *United States*, 263 F. 2d 28, 31 (C.A. 9), certiorari denied, 359 U.S. 989; *United States* v. *Failla*, 164 F. Supp. 307 (D. N.J.); *Loucke* v. *United States*, 21 F.R.D. 305 (S.D. N.Y.); *Collins* v. *City of Wichita, Kansas*, 254 F. 2d 837 (C.A. 10); *Berryhill* v. *United States*, 199 F. 2d 217 (C.A. 6); 7 Moore, *Federal Practice* (2d ed. 1955), pp. 297–298; *cf. Sunal* v. *Large*, 332 U.S. 174.[*]

2. In any event, even if petitioner could properly proceed under Rule 60(b), there would still be no warrant for disturbing the judgment of denaturalization. For this case is not, as petitioner asserts, "indistinguishable on any material issue" from *Nowak* v. *United States*, 356 U.S. 660 and *Maisenberg* v. *United States*, 356 U.S. 670 (Pet. 11–19). Both Nowak and Maisenberg had been naturalized under the Nationality Act of 1906, 34 Stat. 596, as amended,

[*] Petitioner's reliance (Pet. 23–24) upon *United States* v. *Ohio Power Co.*, 353 U.S. 98, is misplaced. That case involved only a construction by this Court of its own rules regarding the treatment of a petition for rehearing of a denial of certiorari. In no way did the decision touch on Rule 60(b), or consider or modify *Ackermann*. Similarly inapposite is *McGrath* v. *Potash*, 199 F. 2d 166 (C.A.D.C.), which involved dissolution of an injunction against a deportation hearing which was no longer necessary because of a statutory change in the prescribed requirements for conducting such hearings.

45 Stat. 1512, which did not in terms preclude Communists from obtaining citizenship. The issue of illegal procurement in those cases, therefore, was not whether the defendants were members of a class Congress had decreed ineligible for citizenship, but whether attachment to the principles of the Constitution, a specific requirement of the 1906 Act, was inconsistent with their Communist Party membership. It was in that context that the Court dealt with the issue of illegality, finding that since the evidence did not clearly and convincingly establish that petitioners were aware of or endorsed the Party's illegal advocacy, lack of attachment had not been established. *Nowak* at 665–668; *Maisenberg* at 672–673.

In this case, however, petitioner was naturalized under the Nationality Act of 1940, 54 Stat. 1137. This Act, unlike the 1906 Act, specifically debarred from citizenship one who, at any time within the ten year period immediately preceding the filing of his petition for naturalization, was a member of, or affiliated with, an organization advocating or teaching the overthrow of the Government of the United States by force or violence (Section 305, *supra*, pp. 2–3). The legislative history of the 1940 Act makes plain that this exclusion was intended to apply to members of the Communist Party (see Hearings before the Committee on Immigration and Naturalization, House of Representatives, 76th Congress, 1st Sess., on H.R. 6127, superseded by H.R. 9980, to revise and codify the Nationality Laws of the United States, pp. 327–331). Moreover, Section 305 of the 1940 Act does

not require that the membership in the proscribed organization be with "knowledge" of its illicit purposes. The legislative history indicates (Congressional hearings, *supra*, p. 394) that Congress considered imposing such a requirement, but decided not to. Thus, Congress intended that membership in, or affiliation with, a proscribed organization would alone preclude naturalization, without proof that the alien personally advocated or endorsed the organization's illegal objectives.

As the district court found, petitioner's own testimony and testimony of other witnesses at his denaturalization trial established beyond doubt that petitioner was an active and meaningful member of the Communist Party from 1931 to at least 1938 (R. 52–54; see opinion of district court R. 23–27).[7] Hence when his petition for naturalization was filed in 1944, he was not a member of a class eligible for naturalization under the 1940 Act. Accordingly, the district court was justified in cancelling the certificate as illegally procured.[8] See *Sweet, et al.* v. *United States*, 211 F. 2d 118, 119–120 (C.A. 6), certiorari de-

[7] Certainly, petitioner's membership in the Communist Party was meaningful within the standard laid down by this Court in deportation cases. See *Galvan* v. *Press*, 347 U.S. 522; *Rowoldt* v. *Perfetto*, 355 U.S. 115.

[8] The observation in *Nowak* (356 U.S. at 668) that the 1940 Act "did not make membership or holding office in the Communist Party a ground for loss of citizenship", is not, as petitioner would read it, a finding that the 1940 Act did not make meaningful Communist Party membership a ground for exclusion for citizenship. On the contrary, this language merely reinforced the Court's finding that one naturalized under the 1906 Act could not be denaturalized on the ground of illegality solely because of Party affiliation.

nied, 348 U.S. 817; but cf. *United States* v. *Richmond*, Civil No. 31995, decided November 19, 1959 (N.D. Calif.).

A further distinction between this case and *Nowak* and *Maisenberg* is that in the latter the sole evidence of fraud consisted of the negative responses to Question 28 on the Preliminary Forms for Petition for Naturalization.[9] Here the evidence of fraud rested additionally on petitioner's direct concealment of Communist Party membership in his alien registration form, filed in December 1940 (see Statement, *supra*, p. 4).

In sum, petitioner has failed to show either the extraordinary circumstances required for reopening a final judgment of denaturalization under Rule 60(b), or that a reconsideration would now lead to a different result.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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[9] Question 28 asks (R. 14): "Are you a believer in anarchy? Do you belong to or are you associated with any organization which teaches or advocates anarchy or the overthrow of existing government in this country?"

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